No. 78-977

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES R. ABNEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner contends that he was denied a fair trial because the jury was selected 42 days in advance of trial. Petitioner also presents 18 other questions, contending, *inter alia,* that the district court granted him inadequate time to prepare for trial, that the prosecutor engaged in misconduct, that the court erred in various evidentiary rulings, and that the instructions of the court were erroneous.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of transporting stolen property across state lines, in violation of 18 U.S.C. 2314. He was sentenced to three concurrent terms of five years' imprisonment (counts 1 to 3) to be followed by one consecutive term of five years' imprisonment (count 4) and to a $5,000 fine (count 1). The court of appeals affirmed without opinion.

Briefly, the evidence at trial showed that petitioner, a dealer in scrap materials, knowingly purchased stolen electronic components from Raul Barreda, who was employed as the raw materials coordinator of Union Carbide Corporation. Petitioner stored the stolen merchandise in his warehouse in Texas, processed it, and shipped it to various out-of-state purchasers.

1. On November 28, 1977, the date on which the case was called for trial, petitioner and his counsel of record, Jacob G. Hornberger, Jr., appeared in the district court at the final pretrial docket call. Petitioner requested a postponement of trial until January 1978. While attempting to accommodate petitioner's request, the district court concluded that judicial economy would best be served by selecting a jury without further delay:

> Well, we can at least select a jury. We do it in the Corpus Christi Division all the time, where we select a jury and set the trial date off a week or two, maybe longer. We have got a jury panel here, will be at 2:00 o'clock, and they're going to be here for jury selection.

Nov. 28, 1977 Tr. 3-4. Petitioner's counsel requested that jury selection be deferred because his father, who was planning to serve as lead counsel at trial, could not be present that day (*id.* at 4). The court denied the motion for continuance, stating that jury selection would proceed that afternoon with a deferred trial date of January 9, 1978 (*id.* at 5). Following a *voir dire* examination conducted almost entirely by the district judge, the jury was empanelled.

Before commencement of trial on January 9, 1978, petitioner asked the district court to present the following supplemental questions to the jury (Jan. 9, 1978 Tr. 34):

> (1) Has anything occurred since you were empanelled on November 28, 1977, to prevent you in any way from rendering a fair and impartial verdict in this case?
>
> (2) Do you know of any reasons whatsoever why you cannot render a fair and impartial verdict in this case?

These questions were presented to the jury by the trial judge, with some additional explanation, as follows (*id.* at 49-50):

> Ladies and Gentlemen of the Jury, it has been several weeks since you were chosen to serve as jurors in this case and you were sworn at that time and given certain instructions with regard to discussing the case and that sort of thing.
>
> I want to ask each one of you to think back over the time since you were instructed, or at least sworn as jurors, and give that brief, introductory instruction, if there has been anything that has happened to you or that you have heard about that would in any way affect your ability to be a fair and impartial juror in the continued trial of this case. Has anything happened that—have you heard anything, talked to anybody, or is anything that you have overheard in any way made it such that you might be prejudiced one way or another or have a difficult time being a fair and impartial juror in this case?

None of the jurors indicated that anything had occurred that would interfere with the impartiality of his or her deliberations.

2. Petitioner contends (Pet. 21-28) that the district court committed error by permitting a 42-day period to intervene between the selection of the jury and the commencement of trial. However, many cases involve at least some post-selection delay, and while that delay

should be minimized where possible, this is a matter of the district court's sound discretion. Prejudice is avoided by conducting supplemental *voir dire* examination prior to trial. See, *e.g.*, *United States* v. *Price*, 573 F. 2d 356, 365 (5th Cir. 1978). The delay in this case occurred because petitioner requested a postponement of trial until January 1978. The district court, attempting to accommodate petitioner's request, was justified in going forward with the *voir dire* in order to avoid wasting the time of the jury panel that was summoned and present on November 28, 1977.

There is no indication that the procedure followed by the district court denied petitioner a fair trial. Petitioner presents no specific claim of prejudice (Pet. 26). His speculation that there may have been "a change in the position or attitude of the jurors during such a long period of time" (*ibid.*) is refuted by the response of the jury to the supplemental *voir dire* questioning. Not a single juror reported any change in attitude or an inability to render a fair and impartial verdict.[1]

3. Petitioner contends that his counsel did not have an adequate opportunity to prepare for the *voir dire*, and that a continuance should have been granted to enable counsel's father to participate (Pet. 21-28). But since the case was called for trial on that date and counsel could have had no assurance that the continuance would be granted, he presumably should have been prepared to proceed with jury selection. Indeed, petitioner's counsel had several hours to prepare for the afternoon *voir dire*,

[1]In any event, petitioner at no time sought a mistrial or otherwise objected on the ground of prejudicial delay, and he did not object to the district court's supplemental questions relating to the effect of the delay. In these circumstances, petitioner has waived his right to contest the procedure followed by the district court. See, *e.g.*, *United States* v. *Eldridge*, 569 F. 2d 319, 320 (5th Cir.), cert. denied, 436 U.S. 929 (1978).

which was conducted almost entirely by the district judge. Moreover, petitioner's counsel handled the case in all of its phases and was obviously familiar with the issues.[2] Petitioner was not prejudiced by being required to proceed with counsel of his own selection, and, in the absence of any showing that counsel's representation was rendered ineffective by the district court's ruling, the discretionary decision of the district court to deny a continuance should not be disturbed. See, *e.g.*, *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).[3]

3. Petitioner also raises for review (Pet. 5-6) the propriety of certain remarks of the prosecutor that caused the district court to warn petitioner's counsel against unethical behavior (Jan. 9, 1978 Tr. 370-373). All of those remarks occurred at a bench conference outside of the hearing of the jury. Thus, they could not have prejudiced petitioner. See, *e.g.*, *United States* v. *Middleton*, 458 F. 2d 482, 483 (5th Cir.), cert. denied, 409 U.S. 863 (1972).[4]

4. Petitioner's assertion that he was denied a fair trial by various evidentiary rulings (Pet. 4-5) is similarly without merit. Petitioner fails to explain the basis for his contentions and fails to show any prejudice. The evidentiary rulings referred to by petitioner were within the broad discretion of the trial judge and should not be

[2]Jacob Hornberger, Jr., was listed as lead counsel at trial. He acted as counsel at the arraignment and docket call, conducted the entire trial, and argued the case to the jury.

[3]Without explanation, petitioner raises various questions for review relating to rulings of the district court on discovery matters. But petitioner has never disputed the fact that his motions for discovery were not in compliance with local court rules (see Nov. 28, 1977 Tr. 5-7). Nor has he disputed the conclusion of the district court that the materials that he sought to discover had in fact been made available to him previously (Jan. 9, 1978 Tr. 4-36).

[4]The district judge later explained that he did not intend to accuse counsel of unethical behavior and apologized for any suggestion to the contrary (Jan. 9, 1978 Tr. 370-373, 385-386).

disturbed on appeal except upon a clear showing of abuse of discretion and prejudice, which is wholly absent here. See, *e.g.*, *United States* v. *Daughtry*, 502 F. 2d 1019, 1021 (5th Cir. 1974).[5]

5. Petitioner's unexplained assertion that the district court improperly denied requested jury instructions is also without merit (see Pet. 7). Petitioner's requested instructions were actually given with only slight changes. Requested charge number 1 (Record on Appeal 38) was submitted by the court in different language (*id.* at 61, 63-65); similarly, requested charge number 2 was submitted with only a slight alteration in phraseology (*id.* at 39, 72-73); requested charge number 7 was also given in substance (*id.* at 44); and the portion of requested charge number 11 that was deleted was given elsewhere (*id.* at 48, 63-64).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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[5]Petitioner's claim that the district court improperly restricted cross-examination to the scope of direct examination is insubstantial. Fed. R. Evid. 611(b) authorizes this restriction.